

FILED
UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS
2004 AUG -4 P 12:18

BENJAMIN FONKEM, Plaintiff)	U.S. DISTRICT COURT DISTRICT OF MASS
)	
V.)	Civil Action No. 04-10754-EFH
)	
DEAN O'MALLEY and)	
TIMOTHY AHERN, in their)	
Individual capacities,)	
Defendants)	

DEFENDANT DEAN O'MALLEY'S ANSWER TO COMPLAINT

Introduction

1. The "introduction" to Plaintiff's Complaint contains statements of law which do not require a responsive pleading. To the extent a responsive pleading is required they are denied.

First Defense

2. In response to Paragraph 1 Defendant states that it contains averments of law which do not require a responsive pleading, but to the extent they do, they are denied.

3. Defendant is without sufficient information on which to form a belief as to the truth of the allegations contained in Paragraph 2 of Plaintiff's Complaint and therefore denies same.

4. The Defendant admits the allegations contained in Paragraph 4 of Plaintiff's Complaint.

5. The Defendant admits the allegations contained in Paragraph 5 of Plaintiff's Complaint.

6. Defendant is without sufficient information on which to form a belief as to the truth of the allegations contained in Paragraph 6 of Plaintiff's Complaint and therefore denies same.

7. Defendant is without sufficient information on which to form a belief as to the truth of the allegations contained in Paragraph 7 of Plaintiff's Complaint and therefore denies same.

8. Defendant denies that he pulled over Mr. Fonkem on **Columbia** Road. Defendant is without sufficient information on which to form a belief as to the truth of the remaining allegations contained in Paragraph 8 of Plaintiff's Complaint and therefore denies same.

9. After stopping Mr. Fonkem, Defendant admits that he ordered Mr. Fonkem to step out of his car. The Defendant denies the remaining allegations contained in Paragraph 9 of Plaintiff's Complaint.

10. The Defendant denies the allegations contained in Paragraph 10 of Plaintiff's Complaint.

11. The Defendant denies the allegations contained in Paragraph 11 of Plaintiff's Complaint.

12. The Defendant admits the allegations contained in Paragraph 12 of Plaintiff's Complaint.

13. The Defendant admits the allegations contained in Paragraph 13 of Plaintiff's Complaint.

14. The Defendant admits the allegations contained in Paragraph 14 of Plaintiff's Complaint.

15. The Defendant admits the allegations contained in Paragraph 15 of Plaintiff's Complaint.

16. The Defendant denies the allegations that he ripped open the fuse compartment and threw papers around and broke all of Mr. Fonkem's cigarettes. The Defendant admits the remaining allegations contained in Paragraph 16 of Plaintiff's Complaint.

17. The Defendant denies the allegations contained in Paragraph 17 of Plaintiff's Complaint.

18. The Defendant admits that Mr. Fonkem told him that he was not a drug user or a dealer. The Defendant denies the remaining allegations contained in Paragraph 18 of Plaintiff's Complaint.

19. The Defendant admits the allegations contained in Paragraph 19 of Plaintiff's Complaint.

20. The Defendant denies the allegations contained in Paragraph 20 of Plaintiff's Complaint.

21. The Defendant denies the allegations contained in Paragraph 21 of Plaintiff's Complaint.
22. The Defendant denies the allegations contained in Paragraph 22 of Plaintiff's Complaint.
23. The Defendant denies the allegations contained in Paragraph 23 of Plaintiff's Complaint.
24. The Defendant denies the allegations contained in Paragraph 24 of Plaintiff's Complaint.
25. The Defendant denies the allegations contained in Paragraph 25 of Plaintiff's Complaint.
26. The Defendant denies the allegations contained in Paragraph 26 of Plaintiff's Complaint.
27. The Defendant admits the allegations contained in Paragraph 27 of Plaintiff's Complaint.
28. The Defendant denies the allegations contained in Paragraph 28 of Plaintiff's Complaint.
29. Defendant is without sufficient information on which to form a belief as to the truth of the allegations contained in Paragraph 29 of Plaintiff's Complaint and therefore denies same.
30. In response to Paragraph 30 of Plaintiff's Complaint, Defendant realleges and incorporates by reference his answers to Paragraphs 1 through 29 above.
31. The Defendant admits the allegations contained in Paragraph 31 of Plaintiff's Complaint.
32. The Defendant denies the allegations contained in Paragraph 32 of Plaintiff's Complaint.
33. The Defendant denies the allegations contained in Paragraph 33 of Plaintiff's Complaint.
34. The Defendant denies a strip search occurred. The Defendant denies the remaining allegations contained in Paragraph 34 of Plaintiff's Complaint.
35. The Defendant denies the allegations contained in Paragraph 35 of Plaintiff's Complaint.

36. In response to Paragraph 36 of Plaintiff's Complaint, Defendant states no response is required as it is directed toward another Defendant. To the extent a response is required, Defendant denies any violations or wrongdoing.

37. The Defendant denies the allegations contained in Paragraph 37 of Plaintiff's Complaint.

38. The Defendant denies the allegations contained in Paragraph 38 of Plaintiff's Complaint.

39. In response to Paragraph 39 of Plaintiff's Complaint, Defendant realleges and incorporates by reference his answers to Paragraphs 1 through 38 above.

40. The Defendant denies the allegations contained in Paragraph 40 of Plaintiff's Complaint.

41. The Defendant denies the allegations contained in Paragraph 41 of Plaintiff's Complaint.

42. The Defendant denies the allegations contained in Paragraph 42 of Plaintiff's Complaint.

43. In response to Paragraph 43 of Plaintiff's Complaint, Defendant realleges and incorporates by reference his answers to Paragraphs 1 through 42 above.

44. The Defendant denies the allegations contained in Paragraph 44 of Plaintiff's Complaint.

45. The Defendant denies the allegations contained in Paragraph 45 of Plaintiff's Complaint.

46. The Defendant denies the allegations contained in Paragraph 46 of Plaintiff's Complaint.

AFFIRMATIVE DEFENSES

First Affirmative Defense

By way of affirmative defense the Defendant says that the Plaintiff was rightfully detained and that the detention was for a reasonable period of time.

Second Affirmative Defense

By way of affirmative defense the Defendant says that he was justified in his conduct and acts and is therefore not liable to the Plaintiff as alleged in the Complaint.

Third Affirmative Defense

By way of affirmative defense the Defendant says that he was justified in his conduct and acts and that therefore the Plaintiff cannot recover.

Fourth Affirmative Defense

By way of affirmative defense the Defendant says that his actions and conduct were performed according to and protected by law and/or legal process, and that therefore the Plaintiff cannot recover.

Fifth Affirmative Defense

By way of affirmative defense the Defendant says that he was privileged in his conduct and acts and that therefore the Plaintiff cannot recover.

Sixth Affirmative Defense

By way of affirmative defense the Defendant says that if the Plaintiff suffered injuries or damage, as alleged, such injuries or damage were caused by someone for whose conduct the Defendant was not and is not legally responsible.

Seventh Affirmative Defense

Defendant is entitled to immunity based upon good faith in that the harm suffered by Plaintiff was not a result which a reasonable person in Defendant's position would have known to result from his actions.

Eighth Affirmative Defense

Defendant says that at all times relevant hereto he has acted without malice toward the Plaintiff and that his actions relative to the Plaintiff were privileged by virtue of his acting reasonably and in good faith within the scope of his authority as a Massachusetts State Police Officer.

Ninth Affirmative Defense

The Defendant has qualified immunity from this suit as the alleged acts complained of occurred within the scope of Defendant's official duties and Defendant had no knowledge that said alleged acts were illegal and/or unconstitutional nor were said alleged acts clearly violative of Plaintiff's rights at the time they were committed.

Tenth Affirmative Defense

The Plaintiff's Complaint against Defendant is frivolous, without basis in fact and not advanced in good faith. The Defendant is therefore entitled to attorney's fees, costs and any other sanctions the Court deems appropriate under the terms and provisions of 42 U.S.C. §1988.

Eleventh Affirmative Defense

Any damage incurred by the Plaintiff as alleged in the Complaint were the result of their own intentional and illegal conduct and they are, therefore, barred from recovery.

Twelfth Affirmative Defense

Defendant says that his conduct or actions were not the proximate cause of Plaintiff's injuries.

Thirteenth Affirmative Defense

Defendant says this action is barred by the statute of limitations.

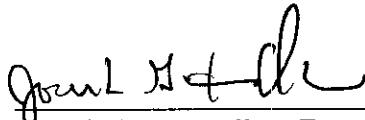
DEMAND FOR JURY TRIAL

The Defendant demands a jury trial on all triable issues.

WHEREFORE the Defendant requests that this Court deny each and every prayer for relief requested by Plaintiff, dismiss this action and award Defendant such other and further relief, including attorney's fees and costs, as this Court may deem appropriate.

Respectfully submitted,
For Defendant Dean O'Malley,
By his attorneys,

LAW OFFICES OF TIMOTHY M. BURKE



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Certificate of Service

I hereby certify that I have served a true copy of the foregoing document upon each other attorney of record by mailing first class postage prepaid.

Dated:

